SCC Court File No: 37194

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

TRISTIN JONES

APPELLANT
(APPELLANT)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(RESPONDENT)

MOTION RECORD OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

(Motion for leave to intervene)

Pursuant to Rules 47 and 55 of the Rules of the Supreme Court of Canada

---

Presser Barristers
116 Simcoe Street, Suite 116
Toronto, Ontario, M5H 4E2

Jill R Presser

Tel: (416)586-0330
Fax: (416) 596-2597
Email: presser@presserlaw.ca

Counsel for the Proposed Intervener

University of Ottawa, Faculty of Law, FTX102
57 Louis Pasteur Street
Ottawa, Ontario, K1N 6N5

Tamir Israel

Tel: (613) 562-5800 x 2914
Fax: (613) 562-5417
Email: tisrael@cippic.ca

Agent for the Proposed Intervener

University of Ottawa, Faculty of Law, FTX102
57 Louis Pasteur Street
Ottawa, Ontario, K1N 6N5

Tamir Israel
David A Fewer

Tel: (613) 562-5800 x 2914
Fax: (613) 562-5417
Email: tisrael@cippic.ca

Counsel for the Proposed Intervener

TO: **THE REGISTRAR OF THIS HONOURABLE COURT**

COPY TO:

Fasken Martineau
55 Metcalfe Street, Suite 1300
Ottawa, ON, K1P 6L5

Patrick McCann
Peter Mantas
Ewan Lyttle

Tel: (613) 696-6906
Fax: (613) 230-6423
Email: pmccann@fasken.com

Counsel for the Appellant, Tristin Jones

Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, ON, K2P 0R3

Marie-France Major

Tel: (613) 695-8855 ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Appellant, Tristin Jones

AND TO:

Attorney General of Ontario
720 Bay Street, 10th Floor
Toronto, ON, M7A 2S9

Randy Schwartz

Tel: (416) 326-4586
Fax: (416) 326-4656
Email: Randy.Schwartz@ontario.ca

Counsel for the Respondent, Her Majesty the Queen (Ontario)

Burke-Robertson
441 MacLaren Street, Suite 200
Ottawa, ON, K2P 2H3

Robert E. Houston, QC

Tel: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Agent for the Respondent, Her Majesty the Queen (Ontario)

AND TO:

Public Prosecution Service of Canada
130 King Street West
Suite 3400, Box 36
Toronto, ON, M5X 1K6

Nicholas E Devlin

Tel: (416) 952-6213
Fax: (416) 952-2116
Email: nick.devlin@ppsc-sppc.gc.ca

Counsel for the Respondent, Her Majesty the Queen (Canada)

Director of Public Prosecutions of Canada
160 Elgin Street, 12th Floor
Ottawa, ON, K1A 0H8

François Lacasse

Tel: (613) 957-4770
Fax: (613) 941-7865
Email: francois.lacasse@ppsc-sppc.gc.ca

Agent for the Respondent, Her Majesty the Queen (Canada)

TABLE OF CONTENTS

Tab	Description	Page
1	NOTICE OF MOTION	1
2	AFFIDAVIT OF DAVID A FEWER	7
3	MEMORANDUM OF ARGUMENT	16
	PART I – FACTS	16
	PART II – STATEMENT OF QUESTIONS AT ISSUE	17
	PART III – ARGUMENT	18
	PART IV – COSTS	25
	PART V – ORDER SOUGHT	25
	PART VI – TABLE OF AUTHORITIES	27
4	*Rules of the Supreme Court of Canada*, SOR/2002-156, ss 55, 57(2)	28

SCC Court File No: 37194

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

TRISTIN JONES

APPELLANT
(APPELLANT)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(RESPONDENT)

MEMORANDUM OF ARGUMENT
OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
(Motion for leave to intervene)

PART I – FACTS

A. OVERVIEW

[1] The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC") seeks an Order granting it leave to intervene in this appeal. This appeal addresses issues of great importance relating to the need to ensure privacy protections are not outstripped by technical evolutions in communications. Its conclusion can have wide-reaching implications for privacy in modern communications. The transmission process of many modern communications – including text messaging – is such that includes processing and storage by a range of intermediaries that have no direct relationship, contractual or otherwise, with the sender of such a message. Moreover, individuals frequently use other's devices to communicate. If privacy expectations were lost where electronic messages are disassociated from an individual's telecommunication account subscription, significant amounts of modern interaction will fall outside of section 8 protection. This would permit changes in communications delivery and practices to overshadow the overriding normative purpose of section 8: whether individuals should be able to expect privacy in particular communications.

[2] Removing communications temporarily stored by an intermediary from Part VI protection has similar effect. Part VI protection applies where communications are intercepted in between their origin and destination. Communications intermediaries temporarily store data for the purpose of facilitating its

transmission with increasing frequency. State access to such ephemerally stored data from the data delivery infrastructure should be viewed as 'between the sender and recipient', falling within Part VI protection regardless of whether the intended state access is prospective or historic in nature. If granted leave, CIPPIC will draw on the unique knowledge and expertise it has developed through its specialized activities in this area of law and policy to assist the Court by providing submissions that are useful and different from those of other parties.

B. THE PROPOSED INTERVENER - CIPPIC

[3] CIPPIC is a legal clinic based at the University of Ottawa's Centre for Law, Technology and Society. Its core mandate is to advocate in the public interest where the law intersects with new technologies in ways that may detrimentally impact on individuals. CIPPIC's advocacy and public outreach activities have extensively engaged matters relating to digital communication and privacy.[1]

[4] This Hounourable Court has previously recognized CIPPIC's capacity to assist the Court on questions relating to privacy in digital media by granting CIPPIC leave to intervene in a number of cases that implicate reasonable expectations of privacy in communications. These include: *R v TELUS Communications Co*, 2013 SCC 16*; R v Fearon,* 2014 SCC 77; and *R v Marakah*, SCC File No 37718, (to be heard alongside the present appeal). CIPPIC has participated in other activities that engage the appropriate normative framework for balancing individual privacy with state investigative objectives, including: presenting expert testimony to Parliament on the need to update Canada's *Privacy Act*, RSC 1985, c P-21, to address modern day privacy expectations; guiding development of the International Principles on the Application of Human Rights to Communications Surveillance, best practices for respecting human rights in modern day communications surveillance endorsed by over 600 leading civil society groups, privacy experts and political entities around the world; and participating in regulatory proceedings on secrecy surrounding advanced surreptitious surveillance tools.[2]

PART II – STATEMENT OF QUESTIONS AT ISSUE

[5] The only issue before the Court in this motion is whether CIPPIC should be granted leave to intervene in this matter of important public interest.

---

[1] Affidavit of **David Fewer**, [Fewer Affidavit], sworn on January 30, 2017, Motion Record, Tab 2.
[2] **Fewer Affidavit**, Motion Record, Tab 2.

PART III – ARGUMENT

[6] An applicant seeking leave to intervene before this Court under section 55 of the *Rules of the Supreme Court of Canada* must address two issues: (a) whether the applicant has an interest in the issues raised by the parties to the appeal; and (b) whether the applicant's submissions will be useful to the Court and different from those of the other parties.[3]

A. CIPPIC's INTEREST IN THIS APPEAL

[7] This appeal is about the level of privacy individuals can reasonably expect where the state wishes to access their electronic communications from a communications intermediary with which they have no direct relationship. CIPPIC's interest in this appeal flows directly from its mandate to participate in internet policy debates and to advocate for the public interest where new technologies intersect with individual rights.

B. USEFUL AND DIFFERENT SUBMISSIONS

[8] The "useful and different submission" criteria is satisfied by an applicant who has a history of involvement in the issue, giving the applicant expertise that can shed fresh light or provide new information on the matter.[4] CIPPIC's submissions will be useful because CIPPIC brings to these proceedings the experience of a legal clinic that has worked with various stakeholders on all sides of competing interests in privacy and communications surveillance. Drawing on this, CIPPIC can offer the Court a useful public interest-oriented perspective on the issues raised in this Appeal.[5] Additionally, CIPPIC's proposed submissions do not raise any concerns that have traditionally led this Honourable Court to refuse intervention. CIPPIC does not intend to expand the issues under appeal beyond those raised by the existing parties. We outline our proposed intervention in the following paragraphs.

C. CIPPIC'S PROPOSED SUBMISSIONS

[9] If granted intervener status, CIPPIC proposes to argue that electronic communications such as text messages attract expectations for high levels of privacy protection, expectations that persist where such communications are handled by communications intermediaries that have no direct contractual relationship with the sender of such messages. Its main submissions will be: (I) that a normative approach, as opposed to a descriptive approach, must be employed when analysing privacy

---

[3] ***Reference re Workers' Compensation Act, 1983 (Nfld)***, [1989] 2 SCR 335, para 8; ***R v Finta***, [1993] 1 SCR 1138, para 5; ***Rules of the Supreme Court of Canada***, SOR/2002-156, ss 55, 57(2).

[4] ***Reference re Workers' Compensation Act, 1983 (Nfld)***, [1989] 2 SCR 335, para 12.

[5] **Fewer Affidavit**, Motion Record, Tab 2.

expectations; (II) that the normative approach favours recognition that individuals can reasonably expect privacy protection even where their messages are being handled by third parties for the purpose of transmission; (III) that Part VI protection survives ephemeral data storage by a communications intermediary for the purpose of facilitating message transmission; and (IV) that the current standard for section 8 standing is unreasonably high.

(i) Assessing privacy expectations must be a normative exercise

[10] This court has long held that the reasonable expectation of privacy is to be assessed normatively not descriptively or empirically.[6] The normative approach is purposive – its goal of ensure the ongoing protection privacy individuals living in a democratic society can reasonably expect remain is driven by the values underpinning section 8 of the *Charter*:

> This court has long emphasized the need for a purposive approach to s. 8 that emphasizes the protection of privacy as a prerequisite to individual security, self-fulfilment and autonomy as well as to the maintenance of a thriving democratic society.[7]

Before assessing the assessment applied by the Courts below to section 8 in the instant case, it is useful to review this Court's jurisprudence on the normative approach, which has identified its hallmarks in contradistinction to the descriptive or empirical approach.

[11] A normative approach is flexible, value driven, and assesses levels of privacy individuals should be able to expect in a democratic state in a purposive manner.[8] Specifically, a normative approach will ask what privacy an individual *should* be able to expect, rather than what they currently do. By contrast, a descriptive or empirical approach would focus on actual existing expectations, emphasizing factors such as: the presence of (purportedly) voluntarily-accepted risk (such as use of weak passwords or exposure to third party control);[9] the impact of a company's decision to engineer their services in a manner that would defeat existing levels of privacy protection;[10] or the state's current capabilities and practices as determiners of privacy expectations.[11] Secondly, while the normative approach remains steeped in the factual context at issue, its determination of what privacy expectations are 'reasonable' is driven by

[6] ***R v Patrick***, 2009 SCC 17, para 14; ***R v Spencer***, 2014 SCC 17, para 18; ***R v Tessling***, 2004 SCC 67, para 42.
[7] ***R v Spencer***, 2014 SCC 17, para 15.
[8] ***R v Spencer***, 2014 SCC 17, para 18.
[9] ***R v Duarte***, [1990] 1 SCR 30, ***R v Fearon***, 2014 SCC 77, para 53.
[10] ***R v TELUS Communications Co***, 2013 SCC 16.
[11] ***R v Tessling***, 2004 SCC 67.

legal principles and values. By contrast, the descriptive approach requires evidence of the claimant's personal expectations or of those held by individuals in general (ie polling data). Finally, the normative approach is holistic and flexible, avoiding the rigid application of fixed criteria, over-reliance on ancillary legal doctrines such as property rights[12] and rules of confidentiality,[13] or reductionist analysis that ignores the broader context engaged.[14] Only by maintaining this flexibility can the analysis maintain its focus on the underlying normative values animating section 8.

[12] Through its flexible and value driven approach, the normative analysis is increasingly important in the context of rapidly evolving communications technologies.[15] Absent the purposive flexibility inherent in the normative approach privacy may easily be overwhelmed by the rigid application of historic rules to modern state surveillance capabilities and communications delivery. Further, modern communications are often intermediated through several entities as part of the data transmission process. Each of these many intermediaries may exert control over communications, limiting the degree of privacy individuals can empirically expect, with far reaching consequences for normative values.

[13] The normative approach retains its flexibility by focusing on the 'totality of the circumstances'.[16] Analytical factors can be useful in assessing the totality of the circumstances. However, this Court has recognized the need to tailor these factors to the context at issue.[17] This Court's most recent guidance on the informational privacy context has focused on a four part analytical framework: (1) identifying the subject matter of the alleged search; (2) Nature of the potentially compromised privacy interest; (3) the claimant's subjective expectation of privacy; and (4) whether this subjective privacy expectation is objectively reasonable, having regard to the totality of the circumstances, with particular emphasis on the last two factors.[18] By adopting a more flexible approach that places the affected subject matter and claimant's privacy interest in it at the forefront of the analysis, this

[12] ***R v Duarte***, [1990] 1 SCR 30; ***Hunter v Southam Inc***, [1984] 2 SCR 145.
[13] ***R v Quesnelle***, 2014 SCC 45, paras 37-44.
[14] ***R v Spencer***, 2014 SCC 17, (customer identification information must be assessed in light of the information it reveals in that context. Namely, it reveals previously anonymous online activity, not merely the customer's name and address).
[15] ***R v Wong***, [1990] 2 SCR 36, p 44.
[16] ***R v Spencer***, 2014 SCC 17, at para 17; ***R v Edwards***, [1996] 1 SCR 128, para 45; ***R v Jones***, [2012] OJ No 6508, [***Jones*, ONCJ**] para 23; ***R v Jones***, 2016 ONCA 543, [***Jones*, ONCA**] para 10.
[17] ***R v Tessling***, 2004 SCC 67, para 31.
[18] ***R v Spencer***, 2014 SCC 17, at para 18. Contrast ***Jones*, ONCJ**, para 25 and ***R v Marakah***, 2016 ONCA 542 [***Marakah*, ONCA**] paras 19 and 57 and 60, adopted by reference in ***Jones* ONCA**.

framework encourages an assessment that remains focused on the privacy interests affected and is therefore better suited to realizing the imperatives of the normative approach.[19]

(ii) A normative analysis yields privacy in temporarily stored text messages:

[14] The Courts below found no subjective or objective expectation of privacy, emphasizing the lack of testimony by the accused on the matter of his expectations,[20] the fact that the text messages were under TELUS' control and produced from TELUS' office without "intrusion upon the property of the Applicant[]", the lack of a proven contractual relationship between the defendant and TELUS, the lack of proactive measures adopted by the defendant for the purpose of protecting his privacy,[21] and the subject matter in question (text message) was not "deeply personal", particularly so where such messages pertain to criminal matters.[22] If granted leave, CIPPIC will argue that a normative analysis of these factors in their totality would favour a reasonable expectation of privacy.

Identifying the subject matter of the search

[15] The subject matter of the privacy expectation in this case is SMS communications or text messages. A normative approach requires a broader approach to identifying the subject matter at issue. If granted leave to intervene, CIPPIC will argue that electronic communications in general and text messaging in particular will tend to reveal intimate personal details about participants. While not every text message will be so revealing, many will.[23] Focusing on the mundane nature of the specific messages captured by the search at issue while ignoring the deeply private nature of electronic communications in general demonstrates a reductionist approach to the subject matter analysis.[24] In doing so, the

---

[19] ***R v Spencer***, 2014 SCC 17, para. 22, [In *Spencer* the court explained that correctly identifying the "subject matter [of a claim of privacy] is important because it in turn allows us to identify what the privacy interest is."]

[20] ***Jones*, ONCJ**, para 24.

[21] ***Jones* ONCJ**, para 31.

[22] ***Marakah*, ONCA**, para 63 ("We are also not dealing with deeply personal, intimate details going to the appellant's biographical core. Here, we are talking about text messages ... that reveal no more than what the messages contained – discussions regarding the trafficking of firearms.").

[23] ***R v Rogers Communications***, 2016 ONSC 70, paara 20.

[24] ***Marakah*, ONCA**, para 63 ("We are also not dealing with deeply personal, intimate details going to the appellant's biographical core. Here, we are talking about text messages ... that reveal no more than what the messages contained – discussions regarding the trafficking of firearms."); and ***R v Spencer***, 2014 SCC 17, paras 25-26: "[I]n characterizing the subject matter of the alleged search, it is important to look beyond the "mundane" subscriber information such as name and address. The potential of that information to reveal intimate details of the lifestyle and personal choices of the individual must also be considered."

broader social value of electronic communications in general and of the text messaging activity particularly engaged by this context were lost. The broader approach, CIPPIC will argue, favours general recognition of electronic communications and text messaging as 'deeply private' subject matter, as access to text messaging will tend to reveal intimate details relating to the individuals engaged in such communications. This Court has rejected such a reductionist analysis, holding that the subject matter assessment cannot be done narrowly, but must focus on the "tendency of information sought to support inferences in relation to other personal information."[25]

Nature of the potentially compromised privacy interest

[16] Normative expectations are not identified in reference to the criminal nature of the interest being compromised. While the record only factually implicates criminal communications, the appropriate context is not "discussions regarding the trafficking of firearms" [26] but whether individuals can expect privacy in text messaging.

[17] Further, the normative approach requires that analytical concepts such as secrecy, control and anonymity be applied in a contextual manner when assessing the nature of the potentially compromised privacy interest. In modern communications, confidentiality and control over information must be ceded to multiple intermediaries (such as TELUS) who exert control in ever-evolving ways (including the temporary storage of otherwise ephemeral text messages to facilitate efficient delivery). As a result, the normative approach analyzes 'control' and 'secrecy' through a layered and contextual lens rather than adopting an 'all or nothing' approach.[27] Ceding control of information to an intermediary for the purpose of data transmission is not synonymous with ceding control for marketing purposes,[28] or for the purpose of facilitating state investigations.[29] By contrast, determining control on the narrow question of

[25] ***R v Spencer***, 2014 SCC 17, para 31.
[26] ***Marakah* ONCA**, para 63; ***R v Spencer***, 2014 SCC 17, para 36.
[27] ***R v Quesnelle***, [2014] 2 SCR 390, 2014 SCC 46, paras 37-44. Helen **Nissenbaum**, "Privacy in Context: Technology, Policy and the Integrity of Social Life" (2010) Stanford University Press, pp 233-4.
[28] **PIPEDA Report of Findings #2015-001**, *Bell's Relevant Ads Program*, (Office of the Privacy Commissioner of Canada).
[29] ***R v Spencer***, 2014 SCC 17 (subscriber identity information fully under the control of an ISP remains highly private in light of anonymous online browsing of subscriber). Contra ***Jones* ONCA** para 16 ("...nothing to suggest Telus was contractually bound to the appellant to keep any of the text messages confidential."); ***Jones*, ONCJ**, para 31 ("There is no evidence that the Applicants had any

who can 'access' the information imports physical concepts that are inappropriate to the context of communications intermediaries. Similarly, requiring a legal relationship of confidentiality between an intermediary and communications sender fails to realize the normative framework's imperatives. Such conditions will rarely exist as most electronic communications are directed at a recipient, whose communications provider will have no relationship with the sender. However, individuals should not be held to expect state access absent properly formulated lawful authority.[30]

Subjective expectation of privacy in communications should be presumed

[18] If granted leave, CIPPIC will argue that requiring individual testimony to establish subjective privacy expectations sets too high a bar for demonstrating subjective privacy expectations, which are in many instances found to be self-evident'.[31] This Court has held that the subjective privacy analysis, while important, should not be so rigorous as to undermine the central question at issue, which is whether individuals in general should be able to expect privacy in conditions comparable to that of the claimant.[32] Further, considerations such as those arising from the contractual relations between a service provider and an applicant, for example, should be considered when assessing the reasonableness of an individual's privacy expectations, not when framing the subjective nature of those expectations.[33] Importing such considerations into the subjective branch of the analysis in this manner undermines the normative approach by focusing too closely on the expectations of an individual, rather than those that society at large should be able to expect.[34] If granted leave, CIPPIC will argue that the sensitive and important nature of electronic communications and interactions in modern life should generally militate towards a presumption in favour of subjective privacy expectations.[35]

---

control over the records themselves or the Telus offices where they were located.").

[30] ***R v Spencer***, 2014 SCC 17.

[31] ***Jones*, ONCA**, para 15 – 16; ***Jones*, ONCJ**, para 21 and para 31 point (vi). ***R v Cole***, 2012 SCC 53, para 43.

[32] ***R v Tessling***, 2004 SCC 67, para .

[33] ***R v Patrick***, 2009 SCC 17, para 37; ***R v Spencer***, 2014 SCC 17, Jones ONCA para 16.

[34] ***R v Patrick***, 2009 SCC 17, para 37.

[35] ***R v Patrick***, 2009 SCC 17, para 37: "in the case of information about activities taking place in the home, such an expectation is presumed in the appellant's favour."; ***R v Pelucco***, 2015 BCCA 370. ***R v Spencer***, 2014 SCC 17.

Expectations of privacy in this context are objectively reasonable

[19] Finally, while the nature of the contractual relationship between an individual and a service provider can affect the reasonableness of any privacy expectation asserted, this is but one factor to be measured in the totality of circumstances. Notably, the lack of a contractual relationship between an individual and the object of a production order should not operate to defeat an otherwise high expectation of privacy. Nor should individuals be stripped of their privacy expectations simply because they are using someone else's mobile telephone or Internet connection. Applying the normative approach, this Court has held that individuals accessing the Internet can reasonably expect service providers to keep their data private even if they are not party to any contractual relationship that may exist.[36] Moreover the *Personal Information Protection and Electronic Documents Act*, which provides a legislative backdrop guiding privacy expectations in this context, protects 'personal information about an individual' regardless of whether the individual is using their own account or another.[37] Further, this Court has rejected an emphasis on 'risk' factors, holding that the reasonableness of privacy expectations is not dependent on whether individuals "structured their affairs to maintain privacy over ... cell phone records."[38] This is particularly so where using others' devices is commonplace.

(iii) Part VI applies to historical communications temporarily stored by intermediaries

[20] Part VI is designed to act as a safeguard against the "insidious danger inherent in allowing the state, in its unfettered discretion to record and transmit our words."[39] This Court has recognized that prospective text messaging is a form of electronic conversation accorded Part VI protection, even when temporarily stored.[40] This Court has similarly held that Part VI should be applied in a technically neutral manner, not to be defeated by artificial and overly technical distinctions.[41] The same principle favours application of Part VI to historical communications ephemerally stored by an intermediary for the

[36] ***R v Spencer***, 2014 SCC 17, para 57: "Mr Spencer was not personally a party to these agreements, as he accessed the Internet through his sister's subscription." Contrast *Jones*, ONCJ, para 31 and ***R v Pervez***, 2005 ABCA 175, para 14.
[37] ***R v Spencer***, 2014 SCC 17.
[38] ***Jones*, ONCJ**, para 31 vii; ***R v Pervez***, 2005 ABCA 175, para 14; ***R v Fearon***, 2014 SCC 77, para 53; ***R v Duarte***, [1990] 1 SCR 30.
[39] ***R v Duarte***, [1990] 1 SCR 30, p 44; ***Jones*, ONCA**, para.23; ***R v TELUS Communications Co***, 2013 SCC 16, para. 19.
[40] ***R v TELUS Communications Co***, 2013 SCC 16.
[41] ***R v TELUS Communications Co***, 2013 SCC 16, paras 40 and 68.

purpose of facilitating accurate and efficient message delivery.[42] Such temporary storage is common – and desirable – in a variety of modern communications systems. Allowing the state to access temporarily stored data from communications providers by means of a production order can have wide-reaching implications for the ongoing utility of Part VI in modern communications. By contrast, requiring the state to continue to rely on Part VI in spite of ephemeral storage by a communications intermediary for the purpose of facilitating message delivery will simply maintain the status quo in a rapidly evolving technological environment.

(iv) The standard for section 8 standing is too high

[21] Obligating claimants to demonstrate a reasonable expectation of privacy as a pre-requisite to asserting section 8 establishes too high a bar for standing. It is self-evident that the Appellant has sufficient interest in the search at issue to challenge its statutory basis in overlapping *Criminal Code* powers. This is because, regardless of the ultimate outcome of said challenge, it is beyond dispute that the Appellant's private data and, by extension, the Appellant's privacy is at issue. CIPPIC finds it odd that an individual has standing to advance a privacy claim for a search that clearly implicates their privacy under statutory laws, but not in relation to their section 8 *Charter* rights.

PART IV – COSTS

[22] CIPPIC will not seek costs in this matter and asks that costs not be awarded against it in this motion or in the appeal if leave to intervene is granted.

PART V – ORDER SOUGHT

[23] CIPPIC respectfully requests an Order from this Honourable Court:

(i) granting CIPPIC leave to intervene in this appeal;
(ii) permitting CIPPIC to file a factum of no greater length than 10 pages;
(iii) permitting CIPPIC to present oral argument at the hearing of this appeal; and
(iv) such further or other Order as deemed appropriate.

[42] ***R v TELUS Communications Co***, 2013 SCC 16, para 41.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of January, 2017.

Tamir Israel

Samuelson-Glushko Canadian Internet Policy
& Public Interest Clinic (CIPPIC)
University of Ottawa, Faculty of Law, FTX102
57 Louis Pasteur Street
Ottawa, Ontario, K1N 6N5

Tel: (613) 562-5800 x 2914
Fax: (613) 562-5417
Email: tisrael@cippic.ca

Counsel for the Proposed Intervener

PART VI – TABLE OF AUTHORITIES

	Authority	*Reference in Argument*
	Cases	
1	PIPEDA Report of Findings #2015-001, *Bell's Relevant Ads Program*, (Office of the Privacy Commissioner of Canada)	17
2	*Reference re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 SCR 335	6, 8
3	*Hunter v Southam Inc*, [1984] 2 SCR 145	11
4	*R v Jones*, [2012] OJ No 6508	13 - 14, 17 - 19
5	*R v Jones*, 2016 ONCA 543	13, 17 - 18, 20
6	*R v Duarte*, [1990] 1 SCR 30	11, 19 - 20
7	*R v Edwards*, [1996] 1 SCR 128	13
8	*R v Fearon*, 2014 SCC 77	11, 19
9	*R v Finta*, [1993] 1 SCR 1138	6
10	*R v Marakah*, 2016 ONCA 542	13 - 16
11	*R v Pervez*, 2005 ABCA 175	19
12	*R v Patrick*, 2009 SCC 17	10, 18
13	*R v Pelucco*, 2015 BCCA 370	18
14	*R v Cole*, [2012] 3 SCR 34, 2012 SCC 53	18
15	*R v Rogers Communications*, 2016 ONSC 70	15
16	*R v Spencer*, 2014 SCC 17	10 - 11, 13, 15 - 20
17	*R v Tessling*, 2004 SCC 67	10 - 11, 13, 18
18	*R v TELUS Communications Co*, 2013 SCC 16	11, 20
19	*R v Quesnelle*, 2014 SCC 46	11, 17
20	*R v Wong*, [1990] 3 SCR 36	12
	Academic	
21	Helen Nissenbaum, "Privacy in Context: Technology, Policy and the Integrity of Social Life" (2010) Stanford University Press	17
	Legislation	
22	*Rules of the Supreme Court of Canada*, SOR/2002-156, ss 55, 57(2)	6